Supreme Court, U.S.
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JUN 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1942

IN THE

United States Supreme Court

OCTOBER TERM, 1986

DAVID JORDAN, et al.,

Petitioners

v.

NORTH MISSISSIPPI RURAL LEGAL SERVICES, INC., et al.,

Respondents

On Writ of Certiorari from the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX "B"

Fifth Circuit Opinion

David JORDAN, et al.,
Plaintiffs-Appellees,

v.

CITY OF GREENWOOD, MISSISSIPPI,
etc., et al., Defendants-Appellees,

v.

NORTH MISSISSIPPI RURAL LEGAL
SERVICES, INC., Movant-Appellant.

No. 86-4001

United States Court of Appeals,
Fifth Circuit.

Feb.2, 1987.

In class action brought under the Voting Rights Act, the United States District Court for the Northern District of Mississippi, William C. Keady, Jr., awarded most of attorney fees to legal service corporation's former staff attorney, personally. On appeal, the Court of Appeals, Johnson, Circuit Judge, held that: (1) representation of both eligible

and ineligible plaintiffs was not "uncompensated" within meaning of regulation authorizing staff attorneys for legal service corporations to perform certain uncompensated work, and thus, any agreement between attorney and legal service corporation authorizing attorney to work on case "outside practice" was invalid, and (2) attorney was not personally entitled to any fee for work performed while employed by corporation, and legal service corporation was entitled to entire award except for portion for services performed by staff attorney after he left position with corporation.

Reversed and remanded.

1. Civil Rights West Key 13.17(21)

Legal services organizations are entitled to attorney fee awards under civil rights attorney fee statute to the same extent as private counsel; such fees usually are awarded to organization itself and not to salaried staff attorneys

involved in case. 42 U.S.C.A. Section 1988.

2. Corporations West Key 377 1/2

Regulation permitting uncompensated outside practice by staff attorneys for legal service corporation under certain circumstances does not encompass any fee-generating work, even if fee is contingent on successfully prosecuting case; outside practice is "compensated" within meaning of Legal Services Corporation Act of 1974, Section 1001 et seq., as amended, 42 U.S.C.A. Section 2996 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

3. CORPORATIONS West Key 377 1/2

Legal service corporation's former staff attorney's representation of both eligible and ineligible plaintiffs in class action suit under Voting Rights Act, resulting in $50,000 award, was not "uncompensated" within meaning of regulation

authorizing staff attorneys for legal service corporations to perform certain uncompensated work, and thus, any agreement between attorney and legal service corporation authorizing attorney to work on case "outside practice" was invalid. Fed.Rules Civ.Proc. Rule 23(b)(2), 28 U.S.C.A.; Voting Rights Act of 1965, Section 2 et seq., as amended, 42 U.S. C.A. Section 1973 et seq.; Legal Services Corporation Act of 1974, Section 101 et seq., as amended, 42 U.S.C.A. Section 2996 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

4. Corporations West Key 377 1/2

Former staff attorney for legal service corporation was not personally entitled to any fee awarded for services rendered on behalf of class, in Voting Rights Act suit, while attorney was employed by corporation, and legal service

corporation was entitled to entire award except for portion for services performed by staff attorney after he left position with corporation, absent any showing by staff attorney that he took any action on behalf of ineligible plaintiffs that was not also required in representing plaintiff who was eligible to be represented under the Legal Services Corporation Act. Fed.Rules Civ. Proc.Rule 23(b)(2), 28 U.S.C.A.; Voting Rights Act of 1965, Section 2 et seq., as amended, 42 U.S.C.A. Section 1973 et seq.; Legal Services Corporation Act of 1974, Section 1001 et seq., as amended, 42 U.S.C.A. Section 2996 et seq.; 42 U.S.C.A. Section 1988.

Appeal from the United States District Court for the Northern District of Mississippi.

Before RANDALL, JOHNSON, and JONES, Circuit Judges.

JOHNSON, Circuit Judge:

This class action, initiated in 1977, has

succeeded in restructing the city government of Greenwood, Mississippi. All that remains is to divide the attorneys' fees awarded pursuant to 42 U.S.C. Section 1988. The claimants are the attorney primarily responsible for the case, Willie Perkins, and his former employer North Mississippi Rural Legal Services, Inc. (NMRLS). We agree with NMRLS that the district court erred in awarding most of the fees to Perkins.

I. BACKGROUND

On May 6, 1977, four members of the Greenwood Voters League filed a class action against the City of Greenwood, Mississippi. The action, filed on behalf of all black residents of Greenwood, challenged the legality of Greenwood's commission form of government under section 2 of the Voting Rights Act, 42 U.S.C. Section 1973. One of the named plaintiffs, Sammie Chestnut, was indigent and therefore eligible for representation by NMRLS, a

public legal services corporation funded pursuant to the Legal Services Corporation Act of 1974, 42 U.S.C. Section 2996. The remaining named plaintiffs were not eligible for NMRLS representation and thus were represented by private counsel.

At the outset of the litigation, NMRLS attorneys worked together with private counsel.[1]

The class complaint, for example, was filed jointly by private counsel and NMRLS attorneys. Similarly, private and public attorneys acting together obtained an order on November 15, 1977, certifying the case as a Rule 23(b)(2) class action. Soon thereafter, however, private counsel reached a strategy impass with the named plaintiffs and withdrew from the case. From that point forward, NMRLS attorneys alone acted on behalf of the class.

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1. Regulations governing the Legal Services Corporation expressly permit such joint efforts between legal service attorneys, and private counsel. See 45 C.F.R. Section 1609.8(c) (1985).

After the class had been certified, NMRLS hired Willie Perkins as a full-time salaried staff attorney. Perkins became active in the Greenwood litigation, eventually assuming primary responsibility for the case. In addition to representing the eligible named plaintiff, Sammie Chestnut, Perkins obtained permission from the executive director of NMRLS to represent the ineligible plaintiffs, whose private counsel had earlier withdrawn from the case. Perkins agreed to represent the ineligible plaintiffs on his own time and without any fee arrangement. NMRLS in turn continued to fully finance the litigation and provide necessary facilities and support services.

Perkins, with the assistance of other NMRLS attorneys, was eventually successful in overturning Greenwood's at-large commission form of government.[2]

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2. The litigation was not without setbacks for the plaintiff class. Following trial of the case in October of 1980, the

On December 5, 1984, the district court entered a final judgment in favor of plaintiffs and approving a plan submitted by Greenwood that called for election of city commissioners from single-member districts.

All that remained was to determine the reasonable attorneys' fees and costs to be awarded pursuant to 42 U.S.C. Section 1988. In its final judgment, the district court directed the parties to negotiate a settlement of the attorneys' fee question. Before any such agreement was reached, however, Perkins resigned from his position

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2. Con't.
district court entered judgment in favor of Greenwood finding that plaintiffs had failed to demonstrate that Greenwood's at-large government was established or maintained for a discriminatory purpose. On appeal, a panel noted that three months after the district court announced its decision, section 2 of the Voting Rights Act was amended to outlaw any voting practice that "results in" a denial or abridgement of the right to vote on account of race or color. Id. at 668. The panel remanded the case to the district court for reconsideration in light of the amendment to section 2. Id. at 670. It was only on remand that plaintiffs eventually prevailed.

with NMRLS and went into private practice.[3] Perkins nevertheless continued working on the case and eventually negotiated a $50,000 settlement. The district court approved of that settlement in an order entered on October 31, 1985.

In the meantime, NMRLS, acting as counsel for the prevailing class, filed a motion for assessment of attorneys' fees and costs. What ensued is the instant dispute regarding the proper distribution of attorneys' fees. Perkins argues that he personally is entitled to the bulk of the fees, relying on his agreement with past executive directors of NMRLS authorizing him while in the employ of NMRLS to represent the ineligible named plaintiffs on his own time.

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3. The parties disagree on the date Perkins left his job with NMRLS. Perkins says that he left on February 13, 1985. NMRLS counters that Perkins did not leave until March 15, 1985. The district court's resolution of this factual dispute in favor of Perkins is not challenged on appeal.

The district court agreed. Following a hearing, the district court awarded $36,000 in fees to Perkins. The district court awarded the remaining $14,000 to NMRLS, $10,000 in reimbursement for litigation expenses and $4,000 for time spent on the case by NMRLS attorneys. The district court found that Perkins had agreed to represent the ineligible named plaintiffs on his own time as a public service to the community. The court further found that because of his friendship with one of the ineligible plaintiffs, Perkins expected his services to be uncompensated, except that a fee might ultimately be awarded to the prevailing party pursuant to 42 U.S.C. Section 1988. The district court concluded that Perkins' representation of ineligible plaintiffs in this case was properly authorized under Legal Services Corporation Regulations and that Perkins was entitled to receive any fees arising from that representation.

NMRLS appeals contending that as counsel of record for the prevailing class, it should receive any fees awarded for services rendered by its staff attorneys, including Willie Perkins. NMRLS argues that any agreement to the contrary between Perkins and prior NMRLS executive directors is invalid under applicable regulations. We agree.

II. DISCUSSION

[1] Legal services organizations are entitled to attorneys' fees awards under 42 U.S.C. Section 1988 to the same extent as private counsel. Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541, 1547, 79 LEd.2d 891 (1984) (whether plaintiff is represented by private counsel or a nonprofit legal organization does not impact section 1988 fee award); Watkins v. Mobile Housing Board, 632 F.2d 565, 567 (5th Cir.1980). In the usual case, such fees are awarded to the organization itself and not to the

salaried staff attorneys involved in the case. See, e.g., Hamilton v. Daley, 777 F.2d 1207, 1213 (7th Cir.1985); Dubose v. Pierce, 579 F.Supp. 937, 963 (D.Conn.-1984), rev'd on other grounds, 761 F.2d 913 (2d Cir.1985) (for legal services attorneys personal rewards of clients' victories limited to knowledge that rights of poor people vindicated).

Perkins argues that the instant case requires a different result. According to Perkins, the Legal Services Corporation Act ("Act") prohibited NMRLS from representing the three ineligible named plaintiffs.[4]

4. Perkins correctly points out that the Act only authorizes the representation of eligible clients. 42 U.S.C. Section 2996f(a)(1) and (a)(2)(A). These provisions do not, however, prohibit representation and funding of a class action where one named plaintiff is eligible and the other are not. Our review of the Act and regulations reveals no clear answer regarding NMRLS's ability to represent the class in such an instance. We note, however, that the regulations expressly approve of "class action litigation when appropriate to provide effective representation to a client or a group of similarly situated clients; ..." 45. C.F.R. Section 1617,4(a) (1985).

Because their private attorney had withdrawn from the case, Perkins agreed to represent the ineligible plaintiffs as private counsel and on his own time. Perkins asserts that the nature of the litigation and his friendship with one of the ineligible named plaintiffs persuaded Perkins to work on the case without a fee arrangement. Perkins argues that such "uncompensated outside practice of law" was properly authorized under the Act and regulations promulgated thereunder.

The Act prohibits a full-time services attorney from engaging in any compensated or uncompensated outside practice of law, except as authorized in regulations promulgated by the Legal Services Corporation. 42 U.S.C. Section 2996f(a)(4).[5]

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4. Con't.
Nevertheless, the question was not raised during the course of this litigation and is not before this Court.

5. Section 2996f(a)(4) provides that: With respect to grants or contracts in connection with the provision of legal

The relevant regulation permits compensated outside practice only if:

(a) The attorney is newly employed and has a professional responsibility to close cases from a previous law practice, and does so as expeditiously as possible; or

(b) The attorney is acting pursuant to an appointment made under a court rule or practice of equal applicability to all attorneys in the jurisdiction, and remits to the recipient all compensation received. 45 C.F.R. Section 1604.4 (1965). It is apparent that neither of these circum-

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5. Con't.
assistance to eligible clients under this subchapter, the Corporation shall ----

....

(4) insure that attorneys employed full time in legal assistance activities supported in major part by the Corporation refrain from (A) any compensated outside practice of law except as authorized in guidelines promulgated by the Corporation;

...

stances exists in the instant case.[6]

Perkins relies instead on 45 C.F.R. Section 1604.5 (1985) which regulates "uncompensated outside practice of law." Regulation 1604.5 permits uncompensated outside practice only if the attorney is acting

(a) Pursuant to an appointment made under a court rule or practice of equal applicability to all attorneys in the jurisdiction; or on behalf of;

(b) A close friend or family member; or

(c) A religious, community, or charitable group.

In particular, Perkins relies on regulation 1604.5(b) which authorizes uncompensated

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6. Section 2996f(a) (4) of the Act may be read to absolutely prohibit compensated outside practice. The Legal Services Corporation has not, however, adopted such an interpretation. Instead, the Corporation has determined to permit two narrow categories of compensated outside practice. Because neither category is involved in the instant case, we need not determine whether the Corporation's interpretation of section 2996f(a) (4) is correct.

outside practice on behalf of a close friend, in this case one of the ineligible named plaintiffs.

Perkins argues that his representation here was "uncompensated" because the fee award was contingent on success. This argument, however, ignores the fact that contingent fees are a common means of compensation in the legal profession. That the contingent fee was awarded pursuant to statute rather than agreement between attorney and client makes no difference. Private civil rights practitioners finance much of their practice on fee awards to the prevailing party pursuant to 42 U.S.C. Section 1988.

Perkins' argument is also at odds with the express justification for limiting the outside practice of legal services attorneys. The Act and regulations seek to focus the energy and dedication of legal services attorneys on their overriding responsibility to assist eligible clients.

45 C.F.R. Section 1604.1 (1985). Outside practice is thus limited to matters either highly unlikely to interfere with that responsibility or necessary to fulfill the attorneys' professional obligations. Regulation 1604.5, for example permits legal services attorneys to fulfill their ethical obligation to accept court appointments and provide pro bono service. It also permits legal services attorneys to provide minor assistance to close friends and family members. Matters involving compensation, in contrast, whether contingent or not, are by nature far more likely to conflict with legal service attorneys' responsibility to eligible clients.

[2,3] We conclude, therefore, that regulation 1604.5 does not encompass any fee-generating work, even if the fee is contingent on successfully prosecuting a

case. Outside practice is "compensated" within the meaning of the Act and regulations if it reasonably may be expected to result in a fee for legal services.[7] Perkins' representation in the instant class action resulting in a $50,000 award was clearly not "uncompensated" within the meaning of regulation 1604.5.[8] Because it was not, any agreement between Perkins and former NMRLS directors authorizing him to work on the case as "outside practice" is invalid.

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7. This definition of compensated practice is consistent with the definition of fee-generating practice contained in the regulations. Regulation 1609.2 defines fee-generating practice as

> any case or matter which ... reasonably may be expected to result in a fee for legal services from an award to a client, from public funds, or from the opposing party.45 C.F.R. Section 1609.2 (1985). Cases where the possibility exists, if successful, of an award under 42 U.S.C. Section 1988 clearly fall within this definition.

8. Perkins mistakenly relies on the clearly erroneous standard of review. The district court's conclusion that Perkins' representation of the ineligible named

[4] Finally, we disagree with any suggestion by Perkins that NMRLS has no proper claim to the fees awarded in this case. NMRLS staff attorneys were counsel of record throughout the course of this litigation. Perkins himself, in his notice of appearance and subsequent filings in the district court, listed his status as a NMRLS attorney. Once the district court entered its Rule 23(b) class certification order, which occurred several months before Perkins was employed, NMRLS's ethical obligations to its eligible client required it to pursue interests which were shared by the class as a whole. Perkins has failed to identify any action that he took on

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8. Con't.
plaintiffs was "uncompensated outside practice" was a legal conclusion subject to de novo review on appeal. The district court found, for example, that former NMRLS directors had authorized Perkins' representation of the ineligible plaintiffs. The district court also found that one of the ineligible plaintiffs was a personal friend of Perkins. Only these predicate factual findings, which are not challenged in this appeal, would be subject to the clearly erroneous standard of review.

behalf of the ineligible named plaintiffs which was not also required in representing his eligible client, Sammie Chestnut.

III. CONCLUSION

We conclude, therefore, that the district court erred in awarding most of the attorneys' fees to Perkins personally. Perkins is not personally entitled to any fee award for services rendered on behalf of the class while he was employed by NMRLS. The parties agree, however, that Perkins is entitled to personal compensation for services provided on behalf of the class after he left his position with NMRLS. See also Shadis v. Beal, 692 F.2d 924 (3d Cir.1982) (Former legal services attorney personally entitled to fee award for services rendered to the class following termination of her employment with legal services.). The case is remanded to the district court to determine the extent, if any, of that compensation.

REVERSED AND REMANDED.

APPENDIX "C"
Fifth Circuit Opinion on Rehearing

No. 86-4001

DAVID JORDAN, ET AL.,

Plaintiffs-Appellees

versus

CITY OF GREENWOOD, MISSISSIPPI, Etc., ET AL.,
Defendants-Appellees,

versus

NORTH MISSISSIPPI RURAL LEGAL SERVICES, INC.,

Movant-Appellant.

Appeal from the United States District Court for the Northern District of Mississippi

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion_____, 5 Cir., 189__, ____ F.2d____)

(March 6, 1987)

Before RANDALL, JOHNSON and JONES, Circuit Judges.

PER CURIAM:

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Sam Johnson

United States Circuit Judge

CLERKS'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX "D"

Statutes and Regulations Involved

Rule 52, FRCP. (Findings by the Court.)

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are

stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motion under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

45 CFR Part 1604 - (Outside Practice of Law)

Section 1604.1 Purpose.

This part is designed to permit an attorney to comply with the reasonable demands made upon all members of the Bar and officers of the Court, so long as those demands do not hinder fulfillment of the attorney's overriding responsibility to serve those eligible for assistance under the Act.

Section 1604.2 Definitions.

(a) "Attorney", as used in this part, means a person who is employed full time in legal assistance activities

supported in major part by the Corporation, and who is authorized to practice law in the jurisdiction where assistance is rendered.

(b) "Outside practice of law", means the provision of legal assistance to a client who is not entitled to receive legal assistance from the employer of the attorney rendering assistance, but does not include, among other activities, teaching, consulting, or performing evaluation.

Section 1604.3 General Policy.

No attorney shall engage in any outside practice of law if the director of the recipient has determined that such practice is inconsistent with the attorney's full time responsibilities.

Section 1604.4 Compensated outside practice.

A recipient may permit an attorney to engage in the outside practice of law for compensation if Section 1604.3 is satisfied, and

(a) The attorney is newly employed and has a professional responsibility to close cases from a previous law practice, and does so as expeditiously as possible; or

(b) The attorney is acting pursuant to an appointment made under a court rule or practice of equal applicability to all attorneys in the jurisdiction, and remits to the recipient all compensation received.

Section 1604.5 Uncompensated outside practice.

A recipient may permit an attorney to engage in uncompensated outside practice of -law if Section 1604.3 is satisfied, and the attorney is acting:

(a) Pursuant to an appointment made under a court rule or practice of equal applicability to all attorneys in the jurisdiction; or on behalf of;

(b) A close friend or family member; or

(c) A religious, community, or charitable group.

45 CFR Section 1611.3 (Maximum Income Level)

Section 1611.3(d) Unless authorized by Section 1611.4 no person whose income exceeds the maximum annual income level established by a recipient shall be eligible for legal assistance under the Act.